Howard Industries, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 1317. Case 15–CA–131447

June 13, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On September 24, 2015, Administrative Law Judge Keltner W. Locke issued the attached decision. The Charging Party, International Brotherhood of Electrical Workers, Local Union No. 1317, filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, the Respondent filed answering briefs, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. June 13, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] We do not rely on the judge's citation to *Shands Jacksonville Medical Center, Inc.*, 359 NLRB 918 (2013), which was issued by a panel subsequently found invalid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

Joseph Hoffman, Esq. and *Kevin McClue, Esq.,* for the General Counsel.
Elmer E. White, Esq. (The Kullman Law Firm), of Birmingham, Alabama, for the Respondent.
Clarence Larkin, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on September 9, 2015, in Laurel, Mississippi. After the parties rested, I heard oral argument, and, on September 10, 2015, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law and Order provisions are set forth below.

CONCLUSIONS OF LAW

1. The Respondent, Howard Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Electrical Workers, Local Union No. 1317, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since about 1970, the Charging Party has been the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the following unit of employees at the Respondent's Laurel, Mississippi facility: All full-time and regular part-time production and maintenance employees, EXCLUDING all other employees, guards, and supervisors as defined in the Act. This unit is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

4. The Respondent and the Charging Party were parties to a collective-bargaining agreement covering the employees in the unit described above. This collective-bargaining agreement was effective from January 21, 2012 to January 20, 2015. This agreement establishes grievance resolution procedures culminating in binding arbitration.

5. At all material times, Gregory Jones has been an employee in the bargaining unit described above.

6. On or about June 12, 2014, the Respondent suspended Gregory Jones, and discharged him on about June 19, 2014.

7. To contest the suspension and discharge of Gregory Jones, described in paragraph 6, above, the Charging Party filed the unfair labor practice charge in this case and also filed a grievance, the latter resulting in a hearing before Arbitrator Cary J. Williams on November 21, 2014. On February 6, 2015, the arbitrator issued an opinion and award denying the grievance and sustaining the suspension and discharge of Jones.

[1] The bench decision appears in uncorrected form at pages 149 through 165 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as "Appendix A" to this certification.

8. Respondent and the Charging Party had agreed to be bound by the arbitrator's decision described in paragraph 6 above, the procedures resulting in the decision were fair and regular, and the arbitrator considered the unfair labor practice issue.

9. The arbitrator's decision described in paragraph 6, above, is not repugnant to the Act.

10. It is appropriate to defer the present Complaint to the arbitrator's decision.

11. Further proceedings are unwarranted.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 24, 2015

APPENDIX A

BENCH DECISION

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. Finding that an arbitrator already has ruled on a grievance factually parallel to the circumstances under consideration here, and concluding that the arbitrator's decision meets the relevant Board standards for deferral, I recommend that the Board defer to that decision and dismiss the Complaint.

Procedural History

This case began on June 24, 2014, when the Charging Party, International Brotherhood of Electrical Workers, Local Union No. 1317, filed an unfair labor practice charge against the Respondent, Howard Industries, Inc., with Region 15 of the National Labor Relations Board. The Region docketed this charge as Case 15–CA–131447 and served it on the Respondent by regular mail the next day. The Charging Party amended this charge on August 18, 2014 and again on August 22, 2014.

The charge alleged that the Respondent had violated the Act by discharging an employee, Gregory Jones, who was the Union's chief shop steward. After an investigation, the Region deferred further proceedings to the grievance-arbitration process specified in the collective-bargaining agreement which the Union and Respondent had negotiated. On November 21, 2014, the Union and Respondent participated in a hearing before Arbitrator Cary J. Williams. On February 6, 2015, the arbitrator issued an opinion and award denying the grievance and sustaining Respondent's discharge of Jones.

Thereafter, the Regional Director for Region 15 rescinded the deferral to arbitration. On May 28, 2015, the Regional Director issued a Complaint and Notice of Hearing. On July 14, 2015, the Regional Director issued a Compliance Specification and Order Consolidating Complaint and Compliance Specification and Notice of Hearing. Respondent filed timely answers to these pleadings.

On September 9, 2015, a hearing opened before me in Laurel, Mississippi. During the hearing, the General Counsel further amended the Complaint to allege that certain named individuals were Respondent's supervisors and/or agents, but this amendment did not add any new unfair labor practice allegations. The General Counsel also amended the Compliance Specification.

Both the General Counsel and the Respondent called and examined witnesses and offered documentary exhibits. After a recess, counsel presented oral argument. All parties had the opportunity to call and examine witnesses and offer documentary evidence for inclusion in the record. After counsel presented oral argument, I recessed the hearing to prepare this bench decision.

Today, September 10, 2015, I am issuing this bench decision.

Admitted Allegations

Based on the admissions in Respondent's Answer and stipulations during the hearing, I find that the General Counsel has proven the allegations raised in Complaint paragraphs 2(a), 2(b), 3, 4, 5, 6(a), 6(b), 6(c), 7, and 8(a). More specifically, I find that the Respondent has an office and place of business in Laurel, Mississippi, where it is engaged in the manufacture and nonretail sale of electrical transformers. Further, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that assertion of jurisdiction in this matter is appropriate.

Additionally, I find that Vice President of Human Resources Loren Koski and Supervisor Charles Smith are supervisors and agents of Respondent within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

Based on the admissions in Respondent's Answer, I also find that the Charging Party, International Brotherhood of Electrical Workers, Local Union No. 1317, is a labor organization within the meaning of Section 2(5) of the Act. Further, I find that at all times since about 1970, the Union has been and is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the following unit of employees at Respondent's Laurel, Mississippi facility:

> Included: All full-time and regular part-time production and maintenance employees.
> Excluded: All other employees, guards, and supervisors as defined by the Act.

Additionally, I find that this unit is an appropriate unit within the meaning of Section 9(b) of the Act. Since about 1970, the Respondent has recognized the Union as the exclusive collective-bargaining representative of employees in this unit, and such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from January 21, 2012 to January 20, 2015. At all times material to this case, the Respondent and the Union have maintained and enforced this agreement, which covers wages, hours and other terms and conditions of employment of the bargaining unit employees.

Based on the admissions in Respondent's Answer, I also find

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

that about June 10, 2014, Respondent's employee Gregory Jones, chief Union steward at Respondent's facility, complained that the Respondent was requiring employees to work mandatory double overtime without proper notice, in contravention of the collective-bargaining agreement. Further, I find that about June 12, 2014, the Respondent suspended Jones and that on about June 19, 2014, the Respondent discharged Jones.

In its Answer, the Respondent denied the allegations raised in Complaint paragraphs 1(a), 1(b) and 1(c) concerning the filing and service of the charge and amended charges in this case, on the basis that it had insufficient information to determine the accuracy of those allegations. The charges and certificates of service are in the record. Based on that evidence, noting the absence of contradictory evidence and the presumption of administrative regularity, I find that the charges were filed and served as alleged.

The Deferral Issue

The Complaint alleges only two actions to be unfair labor practices. These are the Respondent's suspension of Jones on June 12, 2014 and the discharge of Jones on June 19, 2014. Although Respondent admits taking these actions, it denies the alleged unlawful motivation which is an element of a Section 8(a)(3) violation. The Respondent argues that the Board should defer to the February 6, 2015 decision of Arbitrator Williams, which has been introduced into evidence. The General Counsel opposes such deferral.

Arbitrator Williams' decision notes that, in addition to the Union's grievance concerning Jones' discharge, the Union

> also filed an unfair labor practice charge with the National Labor Relations Board, Region 15, on June 24, 2014, and amended that charge on August 18, 2014 and August 22, 2014. The Board deferred the August 22, 2014 amended charge to arbitration to resolve the underlying dispute and a hearing was held in Laurel, Mississippi on November 21, 2014. During the hearing, the parties were afforded the opportunity to present testimony and evidence and no issues were raised regarding timeliness or arbitrability. The arbitrator received post-hearing briefs on January 12, 2015.

With the exception of the Board's compliance officer, who gave testimony concerning backpay issues during the unfair labor practice hearing, the same witnesses testified both before me and before Arbitrator Williams. These witnesses were the discharged employee, Gregory Jones, the Union's president and business manager, Clarence Larkin, the Respondent's vice president of human resources, Loren Koski, and another human resources representative, Bailey James. Additionally, a supervisor, Charles Smith, testified before Arbitrator Williams but did not testify in the unfair labor practice hearing.

The arbitrator's decision, describing the issues raised by each side, included the following: "The Union contends the Company discriminated against Grievant and ultimately suspended and discharged him for his union activities as chief steward."

From the arbitrator's decision it is clear, and I find, that the arbitrator considered the unfair labor practice allegations. Thus, the arbitrator's decision states as follows:

> The evidence and testimony was insufficient to prove that the Company discriminated against Grievant for his union activities as Chief Steward when it suspended and discharged him in June 2014. The Company presented documentary evidence of numerous other employees that were disciplined for violating Rules 35 and 36 when they failed to perform an overtime assignment and left work without authorization . . . The evidence therefore did not prove Grievant was discriminated against or singled out for punishment in this case.
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> As further evidence of discrimination by the Company, the Union presented evidence concerning a grievance filed by Grievant against supervisor Gable. In that case Grievant's discipline was eventually overturned by Arbitrator Bain . . . While Arbitrator Bain's decision did in fact sustain this grievance, the facts therein were not sufficient to prove the Company had any specific animus against Grievant as Chief Steward or as an employee generally. That case did involve both Koski and Bailey who were the decision-makers regarding discipline but there was no evidence they had any ill feelings against Grievant or were "out to get" him either in that instance or in the present case.
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> In addition, the Union presented testimony from Grievant that supervisor Smith was angry at him for filing a grievance on June 10, 2014 based on the June 6th incident regarding the 12 hour rule . . . and that this was additional evidence to support its contention that the Company discriminated against Grievant by discharging him. While the testimony did show that Grievant and Smith had a discussion on June 10, 2014 regarding the grievance filed that day, this evidence did not prove it was the basis for Grievant's subsequent discipline. There was not enough evidence to establish that Smith was engaged to an extent that he sought discipline for Grievant because of the grievance he had filed or that he discriminated against Grievant for this action. To the contrary, the evidence proved that Grievant violated Plant Rules by leaving without permission and failing to complete his overtime assignment. Grievant was disciplined for the violations, not any argument he might have had with Smith over filing a grievance.

Based upon this quoted portion of the arbitrator's decision, I conclude that the arbitrator did consider the allegations that the suspension and discharge of Jones constituted unfair labor practices. For reasons I will discuss later in this decision, I find that the arbitrator sufficiently weighed the evidence and then rejected those allegations.

Legal Analysis

To determine whether it is appropriate to defer to the arbitrator's decision, I first must determine what legal framework and criteria to apply. In *Babcock & Wilcox Construction Co.,* 361 NLRB No. 132 (2014), the Board adopted new standards for deciding when it would defer to an arbitrator's decision. These new standards begin with two

threshold questions familiar from the old criteria; namely, whether the arbitration proceeding was fair and regular and whether the parties had agreed to be bound.

No one has challenged the fairness and regularity of the proceeding before Arbitrator Williams. The record in the present proceeding, including the arbitrator's 14-page decision, convince me that the proceeding was fair and regular. I so find.

Similarly, there is no doubt that the parties agreed to be bound. At the time that Respondent suspended and discharged Jones, and when the Respondent and Union appeared before Arbitrator Williams on November 21, 2011, they were parties to and bound by a collective-bargaining agreement which was effective by its terms from January 21, 2012 to midnight, January 20, 2015. In submitting the matter to Arbitrator Williams, they were following the grievance-arbitration procedure set forth in that agreement. Therefore, I find that the parties had agreed to be bound.

The third prong of the *Babcock & Wilcox* framework consists of three questions, all of which must be answered in the affirmative to satisfy the requirements for deferral. The party urging deferral must show that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award.

With respect to the second question, I conclude that the arbitrator was presented with and considered the statutory issue. In *Babcock & Wilcox*, the Board stressed "that an arbitrator will not be required to have engaged in a detailed exegesis of Board law in order to meet this standard."

Although the arbitrator's decision did not include a discussion of Board case precedent, it did refer to the unfair labor practice issues and engaged in an analysis of the facts related to those issues. Therefore, I conclude that the arbitrator's decision sufficiently satisfies the second of the three criteria.

However, I cannot conclude that the arbitral process satisfied the first criterion, which requires an explicit authorization for the arbitrator to decide the unfair practice issue. Based on the testimony of the Respondent's Vice President Koski, I find that the parties did not explicitly authorize the arbitrator to decide the statutory issue. At the time of the arbitration, the Board had not yet issued its *Babcock & Wilcox* decision.

Now, I turn to the question of whether the *Babcock & Wilcox* standards should be applied here. In *Babcock & Wilcox* the Board noted that when one of its decisions sets a new standard, it customarily applies that standard retroactively to cases then pending, but stated that in this instance, "concerns supporting retroactive application are outweighed by the injustice that would result from applying the new standard in pending cases. Accordingly, we will apply the new standard only prospectively." The Board further stated:

> [W]here parties have already, either contractually or explicitly for a particular case or cases, authorized arbitrators to decide unfair labor practice claims, we shall apply the new standard to all future arbitrations. By contrast, where current contracts do not authorize arbitrators to decide unfair labor practice issues, we will not apply the new standards until those contracts have expired, or the parties have agreed to present particular statutory issues to the arbitrator.

Babcock & Wilcox, 361 NLRB No. 132, slip op. at 14.

The collective-bargaining agreement which included the grievance arbitration procedure was effective from January 21, 2012 to January 20, 2015 and during this period, the Union filed the grievance leading to arbitration. Also during this period, the parties presented this case to the arbitrator. Specifically, they did so during a hearing on November 21, 2014. Based on these dates, I conclude that the Board's previous arbitration deferral policy applies, and not the new policy established in *Babcock & Wilcox*.

It is true that the arbitrator's decision did not issue until after the collective-bargaining agreement expired, but it still arose under and was authorized by the 2012 to 2015 collective-bargaining agreement. Therefore, concluding that the *Babcock & Wilcox* framework does not apply, I will evaluate deferral under the previous standards.

Under the former standards, the Board would defer to an arbitration award when the arbitration proceedings appeared to have been fair and regular, all parties had agreed to be bound, the arbitrator adequately considered the unfair labor practice issue that the Board was called on to decide, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. See *Shands Jacksonville Medical Center, Inc.*, 359 NLRB No. 104 (April 26, 2013), citing *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), and *Raytheon Co.*, 140 NLRB 883, 884–885 (1963).

For reasons already discussed, I have concluded that the arbitration proceeding was fair and regular and that all parties had agreed to be bound. Further, based on the rather extensive discussion in the arbitrator's decision, I conclude that the arbitrator adequately considered the unfair labor practice issues which the Board is called upon to decide.

The General Counsel argues that Arbitrator Williams did not consider an element of the unfair labor practice case, namely, the government's argument that Jones' walking off the job constituted protected activity because it was to enforce a right under the collective-bargaining agreement. Stated another way, the arbitrator did not address the principle, relied on by the General Counsel, that the Act protects activity by one employee to enforce a collectively bargained right. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966).

However, under the Board's former standard, being applied here, an arbitrator need not address the General Counsel's theory of the case with such specificity. In *Olin Corp*., 268 NLRB 573, 574 (1984), the Board held that an arbitrator had adequately considered the unfair labor practice if (1) the contractual issue was factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In the present case, both requirements clearly have been met.

Both the grievance considered by Arbitrator Williams and the Complaint before me concern the Respondent's discharge of Jones. The arbitrator also discussed Respondent's

suspension of Jones before his discharge. Moreover, as already discussed, the arbitrator's decision specifically addressed the unfair labor practice charge and the arbitrator clearly rejected the argument that the suspension and discharge of Jones constituted unfair labor practices. Therefore, I conclude that the issues before the arbitrator were factually parallel to those in this proceeding. See *Motor Convoy,* 303 NLRB 135 (1991).

Now, I must determine whether or not the arbitrator's decision was clearly repugnant to the Act. Under its previous standards, the Board would determine whether a particular award was "clearly repugnant to the Act" by reviewing all the circumstances, including the contractual language, evidence of bargaining history and past practice presented in the case. *Southern California Edison Co.*, 310 NLRB 1229 (1993).

As already noted, the General Counsel has cited Board precedent for the proposition that when Jones walked off the job, he was engaged in activity protected by the Act. Similarly, the General Counsel has argued that this one instance did not constitute an unprotected intermittent work stoppage. The General Counsel also argued that the no-strike clause in the collective-bargaining agreement did not render Jones' action unprotected. Thus, the government contends that the arbitrator's decision was clearly repugnant to the Act.

Under the previous standards, The Board would find deferral inappropriate under the clearly repugnant standard only when an arbitrator's award was "'palpably wrong,' i.e. . . . is not susceptible to an interpretation consistent with the Act." The party seeking to have the Board reject deferral bore the burden of proof. *Motor Convoy*, 303 NLRB 135 (1991).

The Board stated in *Kvaerner Philadelphia Shipyard Inc.*, 347 NLRB 390 (2006), that if "Board precedent exists that supports an arbitrator's decision, it cannot be said that the decision falls outside the broad parameters of the Act. Thus, such a decision is not palpably wrong or clearly repugnant to the Act, even if other Board precedent is arguably contrary to the arbitral decision. See *Marty Gutmacher, Inc.*, 267 NLRB 528–533 (1983)."

In *Mobil Oil Exploration & Producing, U.S.,* 325 NLRB 176 (1997), the Board held that an arbitrator's decision, upholding a discharge, was palpably wrong because the reason for the discharge was the employee's protected activity. In the present case, the General Counsel argues that the reason for the discharge was activity which itself was protected; specifically, Jones' walking off the job to assert a right under the collective-bargaining agreement.

Whether that activity was, in fact, protected, depends on the scope of the no-strike clause in the collective-bargaining agreement. The General Counsel offers an interpretation of the no-strike clause language which would make the language inapplicable to Jones' walkout. Specifically, the General Counsel argues that the prohibition on strikes is limited to those "designed to curtail or interfere with production" and that Jones' walkout was not designed with that intention.

However, an arbitrator is particularly competent and empowered to interpret the language of a collective-bargaining agreement. Here, the arbitrator's decision quoted this no-strike language in the "Pertinent Contract Provisions" of his decision.

Additionally, the arbitrator considered the plant rules which the Respondent had established, pursuant to the collective-bargaining agreement's management rights clause, and determined that Jones had violated the rules in a manner which justified his discharge. Therefore, I conclude that the arbitrator's decision is susceptible to a construction which is consistent with the Act.

In these circumstances, I conclude that the arbitrator's decision was not "palpably wrong," as that term of art is used in Board law, and that it was not clearly repugnant to the Act.

In sum, I conclude that the arbitration proceeding in this case satisfied the Board's previous standards, which control here because the Board decided in *Babcock & Wilcox* to apply its new standards prospectively. Therefore, I further conclude that the Board should defer to the February 6, 2015 decision of Arbitrator Williams.

Accordingly, I recommend that the Board dismiss the unfair labor practice Complaint in the present case. In view of that dismissal, the issues raised by the Compliance Specification are moot.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run. Throughout this proceeding, all counsel demonstrated the highest degree of civility and professionalism, which I truly appreciate.

The hearing is closed.